UNDER **THE INQUIRIES ACT 2013**

IN THE MATTER OF **A GOVERNMENT INQUIRY INTO OPERATION BURNHAM AND RELATED MATTERS**

Date of Minute: 21 December 2018

RULING No 1 OF INQUIRY

Table of contents

Introduction

[1] In this Ruling, we address:

(a) the procedure that the Inquiry intends to follow;

(b) the process for review of classified material;

(c) the Inquiry's orders as to the provision of information to the Inquiry by NZDF and Crown parties.

[2] This Ruling should be read together with Minute No 4 of the Inquiry, dated 14 September 2018.

Background

[3] In Minute No 4, the Inquiry set out the processes it envisaged for conducting the Inquiry and for handling classified material. It invited further written submissions on the matters covered, and said it would hold an oral hearing if requested to do so.

[4] The Inquiry received written submissions on behalf of the Afghan villagers; Mr Jon Stephenson; Mr Nicky Hager; the New Zealand Defence Force (NZDF); the Ministry of Foreign Affairs (MFAT), the Department of Prime Minister and Cabinet (DPMC) and the intelligence and security agencies[1] (together, the Crown parties) Dr Wayne Mapp; and Mrs Hazel Armstrong, as well as a combined submission from six large media organisations.[2]

[5] Several core participants requested an oral hearing and this was held on 21-22 November 2018. At that hearing, oral submissions were made by (in this order)

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1 The Government Communications Security Bureau (GCSB) and the New Zealand Security and Intelligence Service (NZSIS).

2 NZME Publications Ltd, Stuff Ltd, Television New Zealand Ltd, Mediaworks Holdings Ltd, Radio New Zealand Ltd and Bauer Media Group. Together, these entities comprise the mainstream news media in New Zealand.

Ms Deborah Manning for the Afghan villagers; Mr Hager on his own behalf; Mr Davey Salmon for Mr Stephenson; Mr Aaron Martin for the Crown parties, Mr Paul Radich QC for NZDF; Mr Alan Ringwood for the media organisations; Mr Bruce Gray QC for Dr Mapp; and Mrs Hazel Armstrong for herself. In addition, Counsel Assisting, Ms Kristy McDonald QC, provided what might be described as "scene-setting" submissions at the outset of the hearing.

[6] In addition to Minute No 4:

(a) As foreshadowed in Minute No 4,[3] the Inquiry and the Inspector-General of Intelligence and Security (IGIS) agreed a Memorandum of Understanding (the IGIS MOU) dealing with the relationship between this Inquiry and the inquiry the IGIS is conducting into the roles of the GCSB and the NZSIS in certain events in Afghanistan, including the operation in relation to Objective Burnham. That was published on the Inquiry's website on 19 November 2018.

(b) The Inquiry prepared a draft Protocol dealing with the review process for classified material, in conjunction with counsel undertaking the review. That draft Protocol was issued to the core participants and most other submitters for comment on 9 November 2018.

[7] The Inquiry thanks all those who have made submissions, both orally and in writing, and acknowledges, with gratitude, the considerable effort they put into them. Having considered all the submissions made, the Inquiry now sets out its views on the procedure it will adopt for the Inquiry and the process for handling classified material. We should say that:

(a) We do not propose to set out, and respond to, all the submissions made in detail as that would result in a long and somewhat indigestible Ruling. Rather, we propose to keep to the essentials as we see them.

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3 At [32](b).

(b) Where appropriate, we will incorporate the discussion of relevant legal principles from Minute No 4 by reference, rather than repeating the content of that Minute in this Ruling.

Preliminary observations

[8] We make four preliminary observations.

[9] First, at the outset of her submissions, Ms McDonald said that this is likely to be the most procedurally complex inquiry ever held in New Zealand. In terms of the range and nature of the relevant interests to be considered in determining the Inquiry's procedures, that seems a fair assessment. On the side of having an open process are the benefits that come from the principle of open justice, particularly enhancing the confidence of the public, and of those who allege wrongdoing, in the integrity of the Inquiry's work. Factors which indicate the need for a less open process include the fact that some relevant material will be classified and will, quite properly, need to be protected from disclosure, and some witnesses will, again quite properly, require confidentiality. Weighing these competing interests and attempting to devise a procedure which gives us the assurance that we will be able to get at the truth but also meets other legitimate concerns has required a careful and difficult assessment.

[10] Second, the IGIS is required by statute to conduct "in private"[4] her inquiry into the involvement of GCSB and NZSIS in the operations which this Inquiry is investigating. Under the IGIS MOU, the Inquiry recognised that it "should not take any action which would run counter to, or undermine, that statutory requirement".[5] Obviously, we need to take this into account when settling our procedure.

[11] Third, as we noted in Minute No 4, while we accept the need to outline our procedure as best we can, it is important that we retain procedural flexibility. Matters are likely to unfold in ways that we cannot predict and the significance of issues will change over time. As the Inquiry receives and assesses more

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4 Intelligence and Security Act 2017, s 176(1).
5 The IGIS MOU, cl 9.

information, some issues are likely to drop away while others assume greater importance. This feature has become apparent over the last few weeks as the Inquiry obtains and assesses more material.

[12] Finally, there was much common ground among those who made submissions concerning the applicable principles. For example, there was no dispute that the principles of open justice and natural justice are relevant to our determination of the Inquiry's procedure. What was disputed, however, was what exactly those principles require at the level of detail.

Procedure for conduct of Inquiry

[13] As we indicated in Minute No 4, under s 14(1) and (4) of the Inquiries Act 2013, the Inquiry has wide powers to regulate its procedure.[6] However, in making a decision as to the procedure or conduct of the Inquiry, we are directed to comply with the principles of natural justice and have regard to the need to avoid unnecessary delay or cost in relation to public funds, witnesses, or other persons participating in the Inquiry.[7]

[14] The Inquiry has the power to impose restrictions on access to the Inquiry,[8] to the extent that it may hold the Inquiry entirely in private.[9] However, before making any order restricting access, the Inquiry must take into account certain specified matters, namely:[10]

(a) the benefits of observing the principle of open justice;

(b) the risk to public confidence in the Inquiry's proceedings;

(c) the need for the Inquiry to ascertain facts properly;

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6 Minute No 4 of Inquiry, at [43].
7 Inquiries Act 2013, s 14(2).
8 Such as forbidding the publication of submissions (s 15(1)(a)(i)); any report or account of the evidence or submissions (s 15(1)(a)(ii)); and the names of witnesses (s 15(1)(a)(iii)).
9 Section 15(1)(c).
10 Section 15(2).

(d) the extent to which public proceedings may prejudice the security, defence or economic interests of New Zealand;

(e) any person's privacy interests;

(f) whether the absence of some restriction would interfere with the administration of justice, including any person's right to a fair trial; and

(g) any other countervailing interests.

[15] Section 15(3) requires an inquiry to give effect to any restrictions on public access set out in its terms of reference. As we noted in Minute No 4,[11] the Terms of Reference (TOR) for the Inquiry contain a relevant provision, clause 14. It provides:

> As further set out in the Inquiries Act, the Inquiry may, where appropriate, hold the Inquiry, or any part of it, in private. It may restrict access to inquiry information (including evidence, submissions, rulings, hearing transcripts and the identity of witnesses). Such steps may be taken in order to:
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> 14.1. Protect the security or defence interests of New Zealand or the international relations of the Government of New Zealand;
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> 14.2. Protect the confidentiality of information provided to New Zealand on a basis of confidence by any other country or international organisation;
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> 14.3. Protect the identity of witnesses;
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> 14.4. Ensure that individuals' fair trial rights are protected;
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> 14.5. Ensure that current or future criminal, civil or other proceedings are not prejudiced;
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> or for any other reason the Inquiry considers appropriate.

[16] Clause 14 of the TOR is expressed in empowering rather than mandatory terms and identifies various specific reasons that the Inquiry may decide to hold the inquiry, or part of it, in private and to restrict access to certain material (while making it clear that they are not the only reasons that the Inquiry may decide to

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[11] At [71].

impose restrictions). The fact that the TOR contemplate private hearings and other restrictions in circumstances involving the need to protect classified or otherwise confidential material and the identity of witnesses is, in our view, important, given that, as matters presently stand, the Inquiry involves a large amount of classified material and numerous witnesses who seek confidentiality. Recent advice indicates that the volume of classified material is greater than we had originally understood.

[17] The questions of what open justice and natural justice require in the present context occupied much of the argument at the hearing. As we have said, the argument was not about the relevance of either concept; rather, the argument was about their application in the particular circumstances of this Inquiry. While we will not repeat what was said in Minute No 4, we will comment on both concepts before outlining the procedure we intend to adopt.

Open justice

[18] In Minute No 4, we made the obvious point that this is an inquiry, which involves an investigative process, not a court proceeding, which involves an adjudicative process.[12] We noted the fundamental differences between investigation and adjudication and discussed the implications of those differences for the requirements of natural justice and for the principle of open justice.[13]

[19] In relation to open justice, we identified the benefits of the principle by reference to leading authorities and noted that, powerful as the principle is in the context of traditional adjudication through the courts, there was no presumption at common law that inquiries would be conducted by way of an open process.[14] We accepted that, because the Inquiry is considering serious allegations against NZDF, it was desirable that they be investigated by way of a public process to enhance public confidence in both the process and the outcome.[15] We noted, however, that two factors in particular strongly militated against a fully public process, namely the real risk that we would not be able to get at the truth unless we are able to offer

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12 At [42] and [45].
13 At [60]–[66] (as to natural justice) and [67]–[74] (as to the principle of open justice).
14 At [70].
15 At [72].

complete confidentiality to some witnesses, and the inevitability that some important material would remain classified and so unable to be disclosed to non-Crown core participants or to the public.[16]

[20] In their submissions, Mr Salmon for Mr Stephenson and Mr Ringwood for the media interests addressed the open justice principle by reference to certain observations of the Supreme Court in *Erceg v Erceg*.[17] There the Court described the underlying rationale of the open justice principle as being that "transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts".[18] The Court said that the principle also imposes "a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges".[19]

[21] The Court in *Erceg* made two further important points about the open justice principle:

(a) First, it acknowledged that the media has an important role in implementing the principle. The provision of fair and accurate reports by the media of court proceedings facilitates open justice by informing members of the public, in circumstances where they were unlikely to be able to inform themselves (by attending a trial, for example).[20]

(b) Second, it noted that "it is well established that there are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice".[21] The Court went on to give

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16 At [73].

17 *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310. For further discussion of the principle, see Minute No 4 at [68]–[70] and the authorities cited there.

18 *Erceg,* at [2].

19 At [2], citing *Broadcasting Corporation of New Zealand Ltd v Attorney-General* [1982] 1 NZLR 120 (CA) at 132 per Richardson J.

20 *Erceg*, above n 17, at [2].

21 At [3].

some examples, such as to protect young people or the victims of sexual offending.

[22] Those observations were made in the context of court proceedings and, like the many other judicial statements emphasising the importance of open justice in court proceedings, have no automatic application to an inquiry.[22] As can be seen from the criteria in s 15(2) (set out at [14] above), while an inquiry is required to "take into account" the "benefits" of observing the principle of open justice before making an order restricting access, that is but one of six mandatory considerations (the subsection also contains a "catch-all" provision which allows an inquiry to consider "any other countervailing interests").[23]

[23] The question then becomes, what are the benefits of the principle of open justice to which s 15(2)(a) refers? The most commonly identified benefit of open justice is that it preserves public confidence in the administration of justice; but that "benefit" is a separate criterion in s 15 (see s 15(2)(b)). Accordingly, the question is whether there are other benefits of open justice that s 15(2)(a) is intended to capture.

[24] As noted earlier, another benefit of open justice is that it imposes "a certain self-discipline" on all those involved. So, for example, a person giving evidence in public may take more care than if he or she were giving evidence in private. While we agree that this can be a significant benefit of the principle of open justice, in this case we know that openness will mean that some people will not be prepared to give evidence at all, for understandable reasons.

[25] There is a further benefit of open justice, namely that the publicity associated with allegations of wrongdoing often encourages other victims, or people who have relevant knowledge, to come forward. Similarly, an open process

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22 As we discussed at some length in Minute No 4, inquiries differ from court proceedings in important respects and this affects the application of the principle of open justice: see Minute No 4 at [42]–[48] and [60]–[74].

23 The meaning to be given to "countervailing" interests is not obvious. It probably refers to interests which suggest an order imposing restrictions should not be made; but it could mean any factor which is countervailing to any of the mandatory criteria.

may bring into the public domain information that would not otherwise have emerged.

[26] We accept that these are also significant benefits, although we doubt that they have practical application in relation to this Inquiry. This is because publicity associated with the authors' allegations and with the establishment of the Inquiry has already resulted in people contacting us to say that they have relevant information to provide, albeit that they seek confidentiality to do so. In addition to that, we are confident that, from the information now available to us, we will be able to contact all those who are likely to have relevant information.

[27] Finally, we note that inquiries can explain their work to the public and build public trust and confidence even where all or part of their work is closed. For example, an inquiry may issue periodic media releases as to its progress, issue updates through websites or invite public contact or comment through confidential portals. Such initiatives may achieve benefits of the type discussed above.

Natural justice

[28] The submitters advanced different conceptions of what natural justice requires in the present case. Ms Manning argued that the Inquiry was necessary to meet New Zealand's obligation to investigate possible breaches of the "right to life", which is a right protected in the New Zealand Bill of Rights Act 1990[24] and in various international[25] and regional[26] human rights instruments. Ms Manning sought a ruling that this was a primary function of the Inquiry. Among other things, this investigative obligation required that victims have the opportunity to participate fully in the process. This analysis underpinned Ms Manning's arguments about what natural justice requires in the present case.

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24 New Zealand Bill of Rights Act 1990, s 8.

25 International Covenant on Civil and Political Rights, 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976) (ICCPR), art 6. Similar provisions are found in the Universal Declaration of Human Rights (adopted 10 December 1948, GA Res 217A(III), A/RES/217A, III)), art 3; and the Convention on the Rights of the Child adopted 20 November 1989, entered into force 2 September 1990), art 6.

26 European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5 (adopted 4 November 1950, entered into force 3 September 1953), art 2.

[29] Ms Manning outlined a wide range of measures that were required as part of the investigative function and natural justice rights, including, for example, the provision of lists of all material before the Inquiry; orders that amounted, effectively, to discovery of all relevant material; and the right to submit interrogatories and to obtain details of matters such as the discussions with NATO and the United States about access to information under their control. She relied in particular on authorities under the European Convention on Human Rights, such as *Jordan v United Kingdom*,[27] but also referred to other sources, including international instruments, the Minnesota Protocol and human rights law.

[30] For the Crown parties, Mr Martin argued that this Inquiry was not a "right to life" investigation. He noted that there had been an ISAF investigation immediately after the operation concerning Objective Burnham, when allegations emerged that there had been civilian casualties. That inquiry raised no concerns about NZDF's compliance with international humanitarian law and concluded that no further action should be taken. Since then, no credible allegations had emerged of a type that would trigger New Zealand's obligation to undertake a "right to life" investigation; this Inquiry, he submitted, will determine whether there are any such allegations – if it finds that there are, the Government will have to consider what steps it should take, given its obligations under international law.

[31] As to natural justice, the effect of the Crown parties' argument was that the phrase "the requirements of natural justice" in s 14(2)(a) was explained or given meaning by s 14(3).[28] Section 14(3) provides:

> If an inquiry proposes to make a finding that is adverse to any person, the inquiry must, using whatever procedure it may determine, be satisfied that the person–
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> (a) is aware of the matters on which the proposed finding is based; and
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> (b) has had an opportunity, at any time during the course of the inquiry, to respond on those matters.

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27 *Jordan v United Kingdom* (2003) 37 EHRR 2.

28 Mr Radich for NZDF made a similar argument.

These, then, were the key components of the natural justice obligation. In making decisions about procedure or conduct, the Inquiry had to accommodate these components in whatever way it could.

[32] We do not consider that we should make a ruling on the question whether this Inquiry is intended to meet New Zealand's "right to life" investigative obligation. There is certainly no explicit language in the TOR stating such an intention. Ms Manning relied on clause 5 of the TOR, which provides:

> The matter of public importance which the Inquiry is directed to examine is the allegations of wrongdoing by NZDF forces in connection with Operation Burnham and related matters. Operation Burnham took place during a non-international armed conflict, and the applicable legal framework (including international humanitarian law) will be considered.

Ms Manning pointed to the reference to "the applicable legal framework (including international humanitarian law)" and argued that this necessarily included the "right to life" jurisprudence. We observe in passing that such a reference would be an oblique way of directing the Inquiry that it was intended to meet an important "right to life" investigative obligation, although that is not a decisive point.

[33] To assess the duty to investigate any alleged violations of the right to life under New Zealand law, it is necessary to understand the sources of law which would apply when New Zealand is participating in an armed conflict and the law that applies with respect to the examination of conduct occurring in that context. While this is something which we will examine in detail at a later stage of the Inquiry, we make some brief comments here.

[34] Given that this Inquiry relates to the conduct of New Zealand personnel in the context of armed conflict, it is necessary to examine the applicable international law. The sources of international law are set out in Article 38(1) of the Statute of the International Court of Justice. The sources include the following, in descending order of persuasiveness: international conventions and treaties; customary international law; the general principles of law; judicial decisions; and academic teachings. Under general international law, certain norms may be of a peremptory nature, having attained *jus cogens* status. An example of such a norm is the

prohibition of torture, which applies both in peacetime and in the context of armed conflict.

[35] The primary body of law applicable in armed conflict is international humanitarian law. Some of that law is determined by international conventions, in particular, the Geneva Conventions and The Hague Conventions. In the Afghanistan context, this would include Additional Protocol II of the Geneva Convention, which applies specifically to the type of internal non-international armed conflict that existed in Afghanistan at the time of the events in issue. New Zealand has ratified the Geneva Conventions, including Additional Protocol II, which therefore form part of New Zealand law.

[36] International humanitarian law is also derived from additional sources, in particular, customary international law, which is derived from a consistent pattern of state practice and *opinion juris*.[29] Customary international law is also applicable in New Zealand in the absence of obligations imposed by statutes or conventions.

[37] For the sake of completeness, we also note that New Zealand has international obligations as set out in the Statute of the International Criminal Court (the Rome Statute).[30] The International Criminal Court (ICC) is an international, treaty-based court with jurisdiction to try those most responsible for genocide, war crimes and crimes against humanity. It is a court of last resort. In the first instance, States Parties should try, where appropriate, to prosecute individuals for such crimes at the domestic level.[31] The ICC Prosecutor may, in certain circumstances, initiate a prosecution before the ICC. Where a genuine investigation or prosecution has been undertaken in a State party such as New Zealand by the relevant domestic authorities, the case will not be admissible before the ICC.

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29 Academic writings and international organisations also contribute to the content of customary international law. The International Committee of the Red Cross, for example, publishes commentaries of what it regards as the customary international law applicable to armed conflict.

30 New Zealand signed the Rome Statute on 7 October 1998 and deposited its instrument of ratification on 7 September 2000.

31 As far as New Zealand is concerned, see the International Crimes and International Criminal Court Act 2000.

[38] Against this background, we have considered whether a duty to investigate exists under international humanitarian law or any other source of law, as far as it is applicable to this Inquiry. There are several settings where the duty to investigate arises, including in situations involving credible allegations of, for example, the killing of civilians. Subsidiary bodies of law (such as the law discussed in *Jordan* and other cases under the European Convention on Human Rights) are not the principal focus – the Inquiry's principal focus will be on the primary sources of law and, to the extent necessary, it will consider guidance arising in other areas of international law.

[39] It is notable that the Minnesota Protocol, to which Ms Manning referred, explicitly highlights armed conflict as a setting where human rights law governing the right to life does not apply to the same extent as in peacetime, because the protections of international humanitarian law specifically address issues arising in circumstances of armed conflict. That said, we accept that an obligation to conduct investigations can arise under international humanitarian law.

[40] Ultimately, as we have already said, we do not see that it is necessary for us to determine whether or not this Inquiry is intended to meet a "right to life" investigative obligation. As noted, the TOR do not state explicitly that it is. Nevertheless, we accept that, to the extent that an inquiry has a mandate to make factual findings and findings of fault (albeit that it cannot determine civil, criminal or disciplinary liability) and to make recommendations, it may play a part in meeting a country's international investigative obligations. But to say that an inquiry plays a role in a country's response is not to say that it is the country's entire response (which could, of course, include further investigations and other action by appropriate state agencies).

[41] Moreover, even if it were intended to meet, or to contribute to meeting, an investigative obligation, this Inquiry was established under the Inquiries Act and must act consistently with its terms. While we accept that the nature of an investigation which an inquiry is conducting may have some impact on concepts referred to in the legislation (in particular, the requirements of natural justice), there are limits to how far that can be taken. Ultimately, because the Inquiry was

established under, and must operate within, a statutory framework, it is a matter of interpreting and applying the statute.

[42] As we see it, then, our task is to investigate and provide a report to the Attorney-General in accordance with the Inquiry's TOR. That is what we will do. What assessment the Attorney-General reaches on the basis of our report and what he then does, or advises the Government to do, are matters for him. Obviously, the Attorney-General will have a number of options, including seeking a further briefing on the next steps or directing relevant agencies to take further steps.

[43] As to the approach that we should take to the phrase "the requirements of natural justice" in s 14(2)(a), we do not agree with the expansive meaning which Ms Manning gave it, nor do we agree with the more confined meaning that Mr Martin gave it.

[44] Ms Manning sought numerous orders, on the basis that they were required by the duty to investigate and/or natural justice. We do not propose to address them individually. Some have been overtaken by the orders we have already made.[32] More importantly for present purposes, some we have no power to make. For example, Ms Manning seeks orders that amount, effectively, to orders for general discovery, even though the Inquiries Act provides that an inquiry may not make such orders.[33] Other proposed orders seek information in a way that might occur under the Official Information Act 1982; but that Act does not apply to inquiries until they have reported.[34] For example, Ms Manning seeks information from the Inquiry as to the process leading to the provision of material by NATO and the United States, as well as any relevant correspondence. We do not accept that statutory limitations such as the two mentioned can properly be circumvented by relying on an expansive view of the requirements of natural justice.

[45] As to the confined meaning advanced by Mr Martin, while we agree that the principal focus of the phrase "requirements of natural justice" as used in s 14(2)(a) is on ensuring that persons about whom adverse findings might be made are given

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32 Minute No 6 of Inquiry dated 29 November 2018.
33 Inquiries Act 2013, s 22(1)(b).
34 Inquiries Act 2013, s 32.

adequate notice and an opportunity to comment, we do not accept that that is the full extent of the phrase. We need to be alert to the possibility that other natural justice considerations will arise.

Extent of confidentiality claims

[46] Before we discuss the issue of procedure in more detail, we should address the fact that much of the material provided to us is classified or otherwise confidential and there are numerous witnesses in respect of whom confidentiality claims have been made. Obviously, these factors have an impact on what we are able to do in terms of public hearings.

[47] It is also relevant that the work of this Inquiry will overlap with that of the IGIS inquiry. As we have said, the IGIS is required by statute to carry out her inquiry in private. We have recognised in the IGIS MOU that we should not do anything that runs counter to, or undermines, that statutory requirement. This means, in our view, that those aspects of our Inquiry that deal with the role of the GCSB and NZSIS in the operations within our TOR that fall within the scope of the IGIS inquiry must also be conducted in private.

[48] In terms of confidentiality of witnesses, the persons who will most obviously need protection in terms of confidentiality are the Afghan villagers, the authors' sources and any other whistle-blowers. In addition, NZDF has asked for confidentiality for NZSAS members, on the basis that it is necessary to protect their identity to enable them to operate effectively in theatre in the future and it is likely that the intelligence and security agencies will seek confidentiality for any of their personnel who give evidence.

[49] Confidentiality orders are in place to protect the identities of the first two groups. There is an interim order in respect of NZSAS personnel. We consider that we should make that order permanent. We understand that there were such orders in the defamation proceedings which Mr Stephenson brought against NZDF.[35]

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[35] Presumably the witness anonymity orders were made by the Court in the exercise of its inherent jurisdiction.

Having considered the criteria in s 15(2) of the Inquiries Act, we consider that several indicate strongly that we should make an order prohibiting the publication of the name or other particulars likely to lead to the identification of NZSAS personnel. In particular, we accept that publication of the identities of current NZSAS members will prejudice their ability to function in the future in theatre (s 15(2)(d)) and that, at this investigative stage, their privacy interests are engaged, along with those of their families (s 15 (2)(e)). Accordingly, we make our interim order permanent, but subject to variation in the future if circumstances change.

[50] What this means is that most of the pool of potential witnesses are, of necessity, subject to confidentiality orders.

[51] Turning to the documentary material, the Inquiry has already received a significant amount of classified material from NZDF, MFAT, NATO and the United States and has considered much of it. There is, however, a considerable quantity yet to come, some of which requires the consent of overseas partners. Obviously, the Inquiry is concerned to handle classified material in a way that does not jeopardise relationships with overseas partners. We acknowledge that they are important to New Zealand.[36] Consequently, it seems unlikely that much (if any) of the overseas partner-sourced material will be able to be disclosed to non-Crown core participants or to the public.

[52] Messrs Johnstone and Keith are currently reviewing the classified material, but the process is a lengthy one and is unlikely to be completed for many months. The Inquiry considers that it must proceed with its work while that review process is underway.[37] Given the amount of classified material, we think it would be useful to provide the reviewers with priorities. Mr Martin suggested that the primary

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36 See Hon Sir Michael Cullen and Dame Patsy Reddy *Intelligence and Security in a Free Society: Report of the First Independent Review of Intelligence and Security in New Zealand* (29 February 2016); Ministerial Policy Statement *Cooperation of New Zealand intelligence and security agencies (GCSB and NZSIS) with overseas public authorities* (September 2017).

37 Ms Manning submitted that the Inquiry should not proceed to address particular matters until the review process was complete. However, that approach would greatly prolong the Inquiry, in circumstances where the non-Crown core participants have, under the Inquiries Act, no inherent right to receive even declassified material. Given the need to operate efficiently, we see no viable alternative to the Inquiry continuing its work while the review process is underway.

focus of the classified material review should be on dealing with documents in respect of which natural justice considerations might arise. While the Inquiry sees some benefit in that as a rule of thumb because, from its perspective, meeting any natural justice requirements is a high priority, our preference is to ask the reviewers to deal with the classified material by reference to particular topics and to prioritise reviewing those documents within that topic that are the most important. We intend to follow that course.

[53] Against this background, we move on to discuss our procedure.

Discussion

[54] As we said in Minute No 4, an important purpose of the Inquiries Act is to enable inquiries to be carried out "efficiently, effectively, and fairly".[38] In making our decision as to procedure, the Inquiry is directed not only to comply with the rules of natural justice but also to "have regard to the need to avoid unnecessary delay or cost in relation to public funds …".[39] Given that there is inevitably a tension between the requirements of fairness and the need for efficiency,[40] the Inquiry must determine a procedure that gives sufficient recognition to both aspects.

[55] The statutory direction to have regard to the need to avoid unnecessary delay or cost in relation to public funds is important. As the Law Commission's Inquiries Report indicates,[41] there was a concern that inquiries conducted under the Inquiries Act 1908 had become overly legalistic and adversarial in character and that this had increased their cost, complexity and duration unnecessarily, to the point that the Act was rarely used. The Inquiries Act 2013 was intended to break this pattern by making it clear that inquiries have wide powers to choose the procedures that best suit their particular needs, and that court-like, adversarial procedures are not necessary components of an inquiry.[42]

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38 Minute No 4, at [42], citing s 3(1)(c) of the Inquiries Act.

39 Inquiries Act, s 14(2).

40 Minute No 4, at [42].

41 Law Commission *A New Inquiries Act* (NZLC R102, 2008), especially at Ch 4.

42 See the Parliamentary debates: (12 May 2009) 654 NZPD 3133 per Hon Christopher Finlayson and (22 August 2013) 692 NZPD 12763 per Hon Chris Tremain.

[56] To be effective, the Inquiry must get at the truth. That is the reason it was established. Against the background of significant material that is classified or otherwise confidential and the existence of witnesses who are vulnerable in some way and require confidentiality to give evidence, the Inquiry reached the preliminary view in Minute No 4 that much of the evidence (but not all) would have to be taken in private. It accepted, however, that it should be as open as possible about its work, and further to that, has published on its website, and will continue to publish, the submissions it receives (subject to redactions for confidentiality), the Minutes and Rulings it issues and other relevant material, even though it has no obligation to do so.[43]

[57] The Inquiry's preliminary assessment about its evidence-gathering process was challenged by the non-Crown core participants and by the media interests. Their principal arguments were:

(a) The Inquiry does not have the statutory power to exclude core participants from evidence-gathering hearings.

(b) Even if it does, there are viable alternatives which would meet security and confidentiality concerns in relation to information and witnesses while allowing public hearings and cross-examination of Crown witnesses by non-Crown core participants.

(c) Some evidentiary material in the public domain is better than none.

We deal point with each in turn.

(i) Does the Inquiry have the power to exclude core participants from evidence-gathering hearings?

[58] Ms Manning submitted that a private process for taking evidence was not an option available to the Inquiry under the Inquiries Act. Counsel argued that this

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43 The Official Information Act 1982 does not apply to any document created or received by an inquiry until after it has reported (Inquiries Act 2013, s 32(1)), and never applies to submissions as they are not "official information": see Official Information Act 1982, s 2.

was effectively a "closed material procedure" of a type rejected by the United Kingdom Supreme Court in *Al Rawi* and was not authorised under s 15 of the Inquiries Act.

[59] It is important to note that the type of closed material procedure discussed in *Al Rawi* and other English cases involved evidence being given by a defence (ie, Crown) witness before the judge about confidential matters, in the presence of defence counsel but in the absence of the plaintiff and his or her legal representative, but sometimes in the presence of a special advocate who could raise matters and cross-examine on behalf of the plaintiff. By contrast, when we refer to a private process, we mean one that involves simply the Inquiry members, Counsel Assisting and the witness – none of the core participants' lawyers would be present.[44]

[60] Section 15(1) provides in part:

> An inquiry may, at any time, make orders to—
>
> ...
>
> (b) restrict public access to any part or aspect of an inquiry;
>
> (c) hold the inquiry, or any part of it, in private.

[61] Ms Manning argued that the words "in private" in s 15(1)(c) meant that the public could be excluded but did not permit the exclusion of someone who was a core participant (or their legal representative). She argued that core participants were entitled to be present for all hearings of an inquiry, even those held "in private". Ms Manning said that if the Crown wished to place sensitive information before the Inquiry, there were techniques to protect the information (such as confidentiality undertakings from counsel). Ms Manning submitted a special advocate procedure was not appropriate in this context and said that, if the Crown considered that the various techniques to protect the confidentiality of information were insufficient, the consequence would be that the Crown could not introduce the information, that is, an exclusionary rule would apply.

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[44] See the Witness Protocol annexed to Minute No 4.

[62] We note that Ms Manning's view as to the interpretation of s 15(1)(c) was not shared by any other counsel, and we do not agree with it. In our view, s 15(1)(c) empowers an inquiry to conduct all or part of its work in private, including in the absence of core participants and their legal representatives. We note that if Ms Manning is correct, s 15(1)(c) would have the same meaning as s 15(1)(b) (in that it would do no more than allow the Inquiry to exclude the public), and so would be redundant. Moreover, we do not find the various authorities referred to by Ms Manning helpful, as they either concern traditional, court-based litigation or involve statutory settings that are materially different.[45] Ultimately, the Inquiry must determine its procedure in light of the Inquiries Act, the TOR and the nature of the Inquiry.

(ii) Alternatives to meet concerns about the security and confidentiality of information and witnesses

[63] On the basis that the Inquiry does have the legal power to take and test[46] evidence from witnesses in the absence of the lawyers for core participants, the issue becomes whether it should do so. In relation to Crown witnesses, Ms Manning argued that the Inquiry should not do so, and should impose no significant constraints on the ability of non-Crown core participants to cross-examine, see documents and so on. As we have said, in her oral submissions, Ms Manning went so far as to argue that if particular classified material was not disclosed to core participants, it should not be taken into account by the Inquiry.

[64] In short, then, Ms Manning's submission was that non-Crown core participants have full rights of participation. Ms Manning saw this as part of the "right to life" duty to investigate, namely, the requirement that the victims play an effective part in any investigation. Mr Hager supported her position.

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45 For example, s 18 of the Inquiries Act 2005 (UK) places an obligation on the Chair of an inquiry to take reasonable steps so that members of the public and media can attend the inquiry or see a simultaneous transmission of its proceedings and have access to the evidence before the inquiry, although this is subject to any restrictions imposed under s 19. The UK Act therefore contains what amounts to a presumption of openness.

46 By way of cross-examination by Counsel Assisting, for example.

[65] Despite this, both Ms Manning and Mr Hager said in their written submissions that there would need to be a private process for some witnesses (in particular, vulnerable Afghan villagers, journalists' sources and whistle-blowers) and that such witnesses should not be subject to cross-examination by Crown parties and NZDF. As we noted in Minute No 6 and addressed in more detail in Minute No 7, Mr Hager set out a number of conditions on the basis of which his sources would give evidence to the Inquiry.[47] One was that they would not be cross-examined by other parties "especially not the NZDF or other government agencies".

[66] Mr Salmon also accepted that some witnesses would have to give evidence confidentially. However, he argued that this would not be necessary in respect of all witnesses and suggested that some of the concerns about confidentiality, in respect of both information and witnesses, could be met in other ways. He identified two mechanisms in particular.

[67] First, in relation to access to classified material, Mr Salmon submitted that counsel should obtain security clearances so that they can view all the information, albeit that they would not be able to discuss it with their clients. He argued that this was similar in principle to what often happens in commercial cases, where counsel give confidentiality undertakings which enable them to see the other side's commercially confidential information without disclosing it to their clients.

[68] However, as Mr Martin for the Crown parties noted, the Court of Appeal for England and Wales has recently held that although lawyers-only confidentiality rings may be appropriate in the case of commercially sensitive information, they are not appropriate in respect of information protected by public interest immunity.[48] There were three reasons for this – the risk of inadvertent disclosure; the possibility that blame would fall on the innocent if there was inadvertent disclosure; and the difficulty of deciding who could enter the ring and who would

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47 Minute No 7 dated 10 December 2018 at [6].

48 *Competition and Markets Authority v Concordia International RX (UK)* [2018] EWCA Civ 1881, [2018] Bus LR 2452 at [38]–[76], per King LJ, with whom the other members of the Court agreed. See also *Sommerville v Scottish Ministers* [2007] UKHL 44, [2007] 1 WLR 2734, per Lord Mance at [203]–[207].

have to remain outside it.[49] We agree with these points, particularly the last as the result could be that some core participants' lawyers would have access to classified material and others would not. Moreover, the extent and importance of the classified material would make it difficult for counsel to engage with their clients satisfactorily. Finally, such an approach is likely to raise practical problems. If, for example, the counsel for one core participant obtained a clearance but counsel for another did not, there is a risk that the core participant whose counsel could not obtain a clearance would seek to engage counsel who could, which would create further delay. For these reasons, we do not see it as viable that counsel seek to obtain clearances.[50]

[69] Second, in relation to Crown witnesses in respect of whom confidentiality was sought (such as current NZSAS members), Mr Salmon argued that there were techniques (such as the use of screens) which would preserve the anonymity of witnesses while permitting cross-examination of them in public, citing his experience in a recent defamation trial involving Mr Stephenson and NZDF. He argued that, because it was alleged that NZDF was engaged in a "cover-up", as public a process as possible was desirable.

[70] Mr Salmon argued that "adversarial cross-examination" could add value in a case such as this, particularly by facilitating the identification of points that might otherwise be missed. He relied on *Badger v Whangarei Refinery Expansion Commission of Inquiry*.[51] In that case, the Commission had ruled at the outset of its investigation that there would be no cross-examination of witnesses by parties. The High Court quashed that ruling. Barker J said:[52]

> At the stage it made its ruling, the Commission could not possibly know whether matters would become relevant, which would directly or indirectly impinge on the reputation or conduct of an individual or organisation or whether matters would arise whereby natural justice would require the right to cross-examination.

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49 At [39] and [60].

50 If the result of this process was that counsel for non-Crown core participants were able to cross-examine NZSAS and other Crown personnel, logic suggests that some form of arrangement would have to be put in place to enable counsel for NZDF to examine whistle-blowers, journalists' sources and Afghan villagers, which we do not consider is appropriate.

51 *Badger v Whangarei Refinery Expansion Commission of Inquiry* [1985] 2 NZLR 688 (HC).

52 At 705.

[71] We agree that, because of the nature of the allegations, particularly of an NZDF cover-up, the non-Crown core participants and members of the public will want to be reassured that the NZDF narrative of events is rigorously probed. However, we do not agree that *Badger* provides useful assistance in the present context. The inquiry in that case was established under the Inquiries Act 1908 (the 1908 Act). As noted above, one of the important justifications for the enactment of the Inquiries Act 2013 was the perception that inquiries under the 1908 Act had become overly legalistic and adversarial in nature. In the extract quoted above, Barker J links the requirements of natural justice with a right to cross-examine. While we do not rule out the possibility that the requirements of natural justice may mean that there should be an opportunity for cross-examination in some circumstances, we think it likely that natural justice requirements can generally be met in this Inquiry without giving affected parties a right to cross-examine, by, for example, doing what s 14(3) requires.

[72] The material we quoted in Minute No 4 from Robert Scott, "Procedures at Inquiries – the Duty to be Fair", emphasises the difference between the investigative process of an inquiry and the adversarial process of a court.[53] Lord Scott makes the point that adversarial cross-examination has no necessary place in an inquiry. In the circumstances of this Inquiry, we consider that there is a significant risk that such cross-examination would add significantly to the length of hearings without adding corresponding value. While we accept that there are, as Mr Salmon argued, various means by which the Inquiry could control cross-examination (such as limiting the time available, specifying the topics for cross-examination or requiring one counsel to cross-examine on behalf of all non-Crown core participants), the real difficulty is that counsel conducting the cross-examination would not have access to all relevant information (that is, information from all confidential witnesses and from confidential documentary and other material) and the witness under cross-examination may not be able to respond by referring to all relevant information (because it is classified). We do not consider that cross-examination carried out on this basis would assist the Inquiry.

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53 See Minute No 4, especially at [78].

(iii) "Some information is better than none"

[73] The non-Crown core participants seek an evidence-gathering process that is as open as possible. So, while they accept that some evidence will have to be taken in private, they argue that other evidence can and should be taken by way of a public process so that the public is informed of at least some of the evidence the Inquiry is hearing.

[74] However, a public evidence-taking process to the extent possible would necessarily provide an incomplete picture of the events at issue and may be so incomplete in relation to some important aspects of the facts as to be misleading. This is because:

(a) the Inquiry will have a good deal of important confidential material before it that it will not be able to disclose; and

(b) it will not be possible to provide much, if any, indication of what some witnesses have said, as doing so would immediately reveal their identities.

[75] When we asked Mr Ringwood about this, he responded that it was better for the public to have some information rather than none. We have serious reservations about that because we think there is a real risk that a quite erroneous view of facts will become embedded in the public consciousness during the course of what would be incomplete public evidence-gathering hearings and will be difficult to shift. This could well operate unfairly to particular participants, and undermine confidence in the Inquiry's conclusions.

[76] Furthermore, as we said in Minute No 4,[54] we doubt that it will be feasible, logistically, to hold a programme of both private and public evidence-gathering hearings, especially if it involves the evidence of some witnesses being taken in part publicly and in part privately.

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54 At [80].

Conclusion and determinations

[77] Having considered the submissions made to us, we are persuaded that there is more we can do to facilitate the involvement of the non-Crown core participants in the Inquiry's processes, as we outline at paragraphs [82] – [84] below. However, we are not persuaded that we were wrong in reaching the preliminary view that much (perhaps most) of the evidence will have to be taken in private (in the sense described at [59] above).

[78] We have traversed many of the considerations that have led us to that conclusion earlier in this Ruling, but for the sake of clarity we now summarise them:

(a) The Inquiry's primary objective is to get at the truth. Based on the work we have done to date, including our interactions with people who have relevant knowledge but require confidentiality and our consideration of the extent and nature of the classified material, we are convinced that our best chance to get at the truth is to conduct the Inquiry's evidence-gathering from witnesses in private, but subject to the possibility that some may be able to be carried out in a public setting.

(b) It is also relevant that the IGIS inquiry, which must be conducted in private, overlaps with part of our Inquiry and that the Inquiry has agreed obligations in relation to that under the IGIS MOU. We consider that we should not conduct that particular aspect of our Inquiry in a way that would undermine or run counter to the statutory obligation on the IGIS to conduct her inquiry in private. This means, in our view, that that element must be conducted in private.

(c) If Mr Salmon is correct that adversarial cross-examination of NZSAS and other Crown witnesses conducted by counsel for core-participants will assist the Inquiry to get at the truth, and that this

can be done in a way that preserves witness anonymity, then, as a matter of logic, the same analysis should also apply to other witnesses, including whistle-blowers, journalists' sources and Afghan villagers. We do not see that outcome as either desirable or necessary and have no doubt that such a process would dissuade some sensitive witnesses from coming forward, thus impeding the Inquiry's ability to get at the truth.

(d) While we do not rule out the possibility of some cross-examination by counsel for core-participants, as a general proposition we think such cross-examination is unlikely to be appropriate (for example, in relation to confidential witnesses) or of any particular assistance to us. To explain the latter point, we do not consider that cross-examination of Crown witnesses by non-Crown core participants will assist us to get at the truth, partly because it will necessarily be based on limited knowledge of the facts and partly because adversarial cross-examination is unlikely to be an effective tool for obtaining the truth in the particular circumstances of this Inquiry.

(e) Mr Hager made the submission that the Inquiry's processes should be as open as possible to enable him to assist the Inquiry by utilising his considerable experience in investigating issues relating to the NZDF. We appreciate that he and the other non-Crown core participants, and the public more generally, wish to have the assurance that the Inquiry is able to test the NZDF version of events rigorously. The Inquiry has equipped itself to do that by engaging skilled independent specialists to provide it with the necessary advice and assistance.

[79] Accordingly, we make the following determinations:

(a) All witnesses will be witnesses of the Inquiry;

(b) Interviews and evidence-gathering will be carried out in accordance with the procedures set out in the Witness Protocol;[55]

(c) Accordingly, in general:

(i) evidence will be given in private before the members of the Inquiry, assisted by Counsel Assisting;

(ii) the testing of it will be carried out by the Inquiry members and Counsel Assisting;

(iii) core participants will not be entitled to cross-examine witnesses except in circumstances where the Inquiry thinks it would be helped by such cross-examination or where there is no other way in which the Inquiry can meet its natural justice obligations;

(iv) core participants may be able to suggest topics and lines of questioning for the Inquiry to consider pursuing in its questioning of witnesses; and

(d) We make the interim non-publication order in respect of NZSAS personnel permanent, but subject to further order of the Inquiry.

[80] Mr Martin said that the Crown parties do not oppose the disclosure of redacted or summarised versions of transcripts and "will say" statements of Crown witnesses who have confidentiality. He submitted, however, that it was vital that the Crown be involved in the redaction/summary process, as the originator of the information, and outlined a process for the Inquiry's consideration.[56]

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55 We note that the Witness Protocol contemplates consideration of a separate process for dealing with the evidence of the Afghan villagers. The Inquiry has not yet considered an appropriate process.

56 Mr Martin took a similar view about the production of lists of classified material etc: see [92]–[93] below.

[81] We think it most unlikely that the Inquiry will be able to undertake such an exercise for all confidential Crown witnesses, given the number involved and the nature of the classified material that many of them will be dealing with. It would involve considerable time, effort and additional expense, and would distract the Inquiry from its principal objectives. Moreover, if we were to follow a process such as that outlined by Mr Martin for all Crown witnesses who have confidentiality, we would likely have to follow a similar process, involving counsel for non-Crown core participants, in respect of other witnesses who have confidentiality. That said, we acknowledge there may be instances where the requirements of natural justice mean that a process such as that outlined by Mr Martin will have to be followed.

[82] In terms of further public hearings, we are attracted to Ms McDonald's proposal that we conduct modules.[57] Such modules would facilitate our desire to conduct as much of the Inquiry in public as is reasonably practicable in order to both facilitate public understanding of the issues and enhance public confidence in the Inquiry. We set out below a general description of the modules as we currently envisage them.

[83] The first module would deal with the Government's decisions to deploy New Zealand troops (including the NZSAS) to Afghanistan following the 9/11 attacks in the United States and later in 2009; the nature of Afghanistan, its history and its people; and a brief account of the development of armed conflict there. The nature and function of the NZSAS will also be addressed. It will also deal with the location of the Objective Burnham operation and the points of difference that have arisen over that. We would like this module to occur in late-March 2019.

[84] Subsequent modules, which will occur at approximately six-weekly intervals, will deal with the rules of engagement (ROE); the predetermined and offensive use of force against targeted individuals; and the obligations surrounding the transfer of suspected insurgents to Afghan authorities. To take the ROE as an example, the public hearing would explore issues such as how ROE are developed; how they are approved; how they are set for particular operations; how members of

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[57] Submissions of Counsel Assisting dated 21 November 2018, at [75].

the NZSAS are trained in them; and how breaches are dealt with. If the ROE for the particular operations at issue remain classified, the public hearing would not go into the detail of them, however. We see these hearings as a means by which issues of principle and process can be explored, so as to aid public understanding. We will issue a minute in advance of each module to explain how it will be structured.

[85] Moreover, we intend to continue the practice of placing material on the Inquiry's website to assist the public's understanding of the Inquiry's work.

Process for dealing with classified material

[86] In Minute No 4 we identified two fundamental principles for dealing with classified material:[58]

> (a) While such material remains classified, the Inquiry will handle it in accordance with the Government's Protective Security Requirements and will not make it available (whether directly or indirectly) to anyone other than those assisting the Inquiry who hold the appropriate security clearance. (This is subject to the possibility that the originators of particular documents may agree to their wider disclosure.)
>
> (b) The Inquiry has the power, by virtue of s 27 of the Inquiries Act and s 70 of the Evidence Act, to assess classification claims in relation to particular information. It will not agree to any process or requirement that has the effect of limiting the Inquiry's ability to exercise that statutory power.

[87] We confirm our commitment to those two principles.

[88] The Crown parties have asked that we make a confidentiality order under s 15 in respect of all classified material, on the basis that the order would be subject to variation or cancellation in relation to particular material if the result of the review process in relation to that material was that the Inquiry did not uphold a claim for non-disclosure. The Crown parties sought that order on the ground that it would provide certainty pending completion of the review process. The Crown parties submitted:[59]

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58 At [5] and [21].

59 Summary of Crown Submissions for Hearing on 21 and 22 November 2018, dated 15 November 2018, at [64].

> That certainty is important to the Crown for two reasons: first, it will assist international partners to understand the legal basis on which documents are held by the Inquiry pending the outcome of the review process; secondly, it will ensure that all classified material received by the Inquiry will be excluded from the definition of "official information" at the conclusion of the Inquiry process, unless the order is varied at the conclusion of the review process.

[89] In effect, the s 15 order sought is worded so as to reflect the two fundamental principles set out at paragraph [86] above. It reinforces the Inquiry's commitment to hold and deal with classified material consistently with the Protective Security Requirements but recognises that, consistently with the Inquiry's statutory powers, there is a review process which may ultimately result in the disclosure of some material. Accordingly, we agree that such an order is appropriate, but subject to further order of the Inquiry following the review process.

[90] We make a non-publication order under s 15 of the Inquiries Act in respect of all classified material provided to the Inquiry, but subject to variation or cancellation in relation to particular material in respect of which a claim for non-disclosure is not upheld following the review process.

[91] In relation to the "Draft Protocol for the review of classified information/claims to withhold information from disclosure", we consider that it should now be confirmed and confirm it accordingly. Mr Martin expressed a concern that the draft contained a "presumption of disclosure", which was inconsistent with the position under the Inquiries Act that core participants and others do not have a right to the disclosure of all or any material provided to the Inquiry (subject to any natural justice requirements). We agree that there is no presumption of disclosure under the Inquiries Act. Disclosure will be ordered where the Inquiry considers it appropriate for some reason. However, we see no need to modify the Draft Protocol to reflect this, particularly as the review will now be rather more focussed in order to deal with the larger volume of material than originally contemplated.

[92] Mr Martin said that the Crown parties do not oppose the production of a comprehensive unclassified list of classified material or the disclosure of unclassified redacted or summarised versions of classified material. He outlined a

process for dealing with this, as with the summaries of witness transcripts and "will say" statements.

[93] The review process that we have established for classified material contemplates the possibility that unclassified redacted versions, summaries or "gists" of classified material may be released. That will not be possible in respect of all classified material, given its extent, but may be possible for some. We do not consider that it is necessary for the Inquiry to produce a complete list of all classified material supplied to it, although the Crown may choose to do that itself.

Provision of information to Inquiry by NZDF and Crown parties

[94] In Minute No 6, we ordered NZDF to produce to the Inquiry "all documents or things relevant to the matters identified in paragraph [7] of the Terms of Reference and are in its possession or control". We also ordered NZDF to provide information concerning those involved in the operations in relation to Objective Burnham on 21–22 August 2010; Objective Nova on 2–3 October 2010; the capture of Qari Miraj on 16 January 2011; Alawuddin and Qari Musa on 20 and 23 May 2011 respectively; and Abdullah Kalta on 21 November 2012.

[95] Naturally enough given the allegations in *Hit & Run*, the TOR focus on Objective Burnham. However, they also refer specifically to the operations in respect of Objective Nova and Qari Miraj. In addition, they raise explicitly the issue of targeted killings. Given that the various operations identified in paragraph [94] above are all connected, in the sense that the targeted individuals were all identified as having played a significant part in the attack in Banyan province that resulted in the death of Lieutenant Tim O'Donnell, the Inquiry considers that they are within the TOR – they are "related matters" to "Operation Burnham".

[96] However, that does not mean that that we require the disclosure of documents in respect of these operations to the same extent that is necessary in relation to the Objective Burnham operation. While all aspects of the Objective Burnham operation are the subject of the TOR, there are only certain aspects of the other operations that are primarily relevant. In particular, in relation to the

operations involving Alawuddin, Qari Musa and Abdullah Kalta what we are primarily interested in is the targeted killing/capture aspects of the operations. This focus raises issues relating to the existence of the Joint Prioritised Effects List; how particular people came to be named on it; the basis on which the use of deadly force was justified; and the results of those operations. For immediate purposes, the provision of documents in relation to those operations should focus on those matters. If it turns out that we will need disclosure on a broader basis, we will advise accordingly.

[97] The same analysis applies in respect of our requests for information from GCSB and NZSIS.

Afterword

[98] Since we completed the above, we have received responses from the authors and from the Afghan villagers to the orders in Minute No 6 for the provision of information of certain information to the Inquiry.

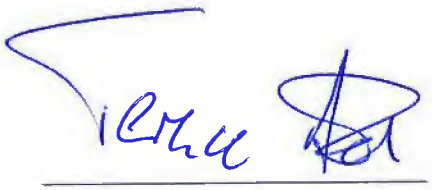
(a) Mr Hager has declined to provide details about his source or sources and seeks an indefinite extension to the time for complying with the Inquiry's order. The Inquiry considers that it is untenable to extend time indefinitely and declines to do so. It will accordingly treat Mr Hager as having invoked the confidentiality accorded to journalists in respect of their sources by s 68 of the Evidence Act 2006.

(b) Mr Stephenson has said he will provide the details of three of his sources through Counsel Assisting but has claimed confidentiality under s 68 in relation to the remainder, pending further discussions with those sources and with the Inquiry about the protections it can offer.

(c) Ms Manning has provided the names and other details of her Afghan villager clients and has sought certain orders as to confidentiality.

We will address these in a separate minute in the New Year but in the meantime, we make an interim order prohibiting the publication of the names or any identifying particulars of Ms Manning's Afghan clients.

[99] Obviously, the stance adopted by the authors creates some difficulty for the Inquiry. We will issue a further minute early in the New Year to address the position.



Sir Terence Arnold QC

Sir Geoffrey Palmer QC

Parties:
Mr McLeod for the Afghan Villagers
Mr Radich QC for New Zealand Defence Force
Mr Hager
Mr Salmon for Mr Stephenson